Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1028

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner*

v.

ROBERT LEE MOSLEY, LIBERTY MUTUAL INSURANCE COMPANY, SEA TOWERS APARTMENTS, AND FLORIDA INDUSTRIAL RELATIONS COMMISSION, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON APPEAL FROM THE SUPREME COURT OF FLORIDA

DAVID A. DANIELSON
ANTHONY J. BEISLER, P. A.
1650 N. E. 26th Street
Fort Lauderdale, Fla. 33305

THEODORE R. HAINLINE
HAINLINE & BILLING
200 S. E. Sixth Street
Fort Lauderdale, Fla. 33301

Attorneys for Respondents

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v.

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COMES NOW THE Respondents, LIBERTY MUTUAL INSURANCE COMPANY and SEA TOWER APARTMENTS, pursuant to Rule 24, Rules of the Supreme Court of the United States, and files this its Brief in Opposition to Petition for Writ of Certiorari.

QUESTION PRESENTED

Did the Florida Courts Deprive the Petitioner Insurance Company of North America of Its Property Without Due Process of Law as Guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States by Binding the Petitioner to a Judicial Determination Made in Which the Petitioner Was Not a Party and Had No Notice Nor Opportunity to Defend?

ADDITIONAL STATUTORY SECTIONS INVOLVED IN THIS CASE

Florida Statutes

§ 440.42(3) INSURANCE POLICIES; LIABILITY.—

When there is any controversy as to which of two or more carriers is liable for the discharge of the obligations and duties of one or more employers with respect to a claim for compensation, remedial treatment or other benefits under this chapter, the division shall have jurisdiction to adjudicate such controversy; and if one of the carriers voluntarily or in compliance with a compensation order makes payments in discharge of such liability and it is finally determined that another carrier is liable for all or any part of such obligations and duties with respect to such claim, the carrier which has made payments either voluntarily or in compliance with a compensation order shall be entitled to reimbursement from the carrier finally determined to be liable, and the division shall have jurisdiction to order such reimbursement; provided, however, that if the carrier finally determined liable can demonstrate that it has been prejudiced by lack of knowledge or notice of its potential liability, such reimbursement shall be only with respect to payments made after it had knowledge or notice of its potential liability.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY *

Petitioner's selective statement of the facts imply that there was no January 5, 1973, accident, that Sea Tower Apartments, the employer herein, had no notice of a January 5, 1973, accident and that Liberty Mutual Insurance Company, through some sort of contrivance, stipulated to a January 5, 1973, accident so as to place responsibility upon Insurance Company of North America. The facts clearly do not support such implications.

The evidence presented to Judge Carson clearly supports an accident occurring on January 5, 1973. The claimant testified at his deposition (TR-375-376) as follows:

> Q. When you first got hurt, Mr. Mosley, did you keep on working?
>
> A. That's what I'm trying to study now. You see, I worked—When I left off the job was January 5th. That was the day that the pull, that I really pulled my back.
>
> Q. Was that again on the Dumpster?
>
> A. That was on the Dumpster.
>
> Q. Now, that was what day, sir?
>
> A. That was January 5th.

The Claimant further testified at TR-382 as follows:

> Q. Then on January 5th, were you pushing a Dumpster? That was also a Friday.

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* To comply with the requirements of the Supreme Court Rules, the respondents will refer to page numbers in the record-on-appeal before the Florida Industrial Relations Commission. Said record has been paginated for use before the Florida Industrial Relations Commission and the Florida Supreme Court.

A. Right.

Q. And what happened when you pushed the Dumpster on January 5th?

A. That's when I felt something just like something click.

MR. BEISLER: Double click, huh? Click and double click.

Q. Pulling apart?

A. Right.

Q. Okay. Then after these things happened, did you report these to a manager by the name of Vince?

A. I did.

Q. Okay. And was there also a man that had something to do with the Sea Tower named Bergander or something like that?

A. Bergander, yeah.

Q. Now, who is he?

A. He was the—He was the—I can't remember the name. Supervisor or—

Q. Chairman or something like that?

A. Chairman.

Q. All right. Was he aware of both of these episodes?

A. Oh, yes. He was aware of it.

The Claimant's testimony at the trial was unchanged. In Tr. 168-170, the Claimant related the January 5th accident and reporting the same to his employer:

Q. Now, what happened to you on January 5th, of this year, 1973?

A. Well, we had done told them—I had done told them about two or three times about that front wheel on this here dumpster. Instead of rolling straight down the trace—they had a deep track there—well, the wheel Instead of rolling straight ahead comed over and was bound against the side—the metal.

Well, I had done told them two or three times they were bound. And, so, when we get ready to push it out of there, we have to get a bar and stick up under there and get it rolling. Sometimes, we would get it right in the door and it would still bind on us. We would have to put that bar back up under there to get it out.

As I was getting it out I felt this here pull, like something pulled loose. So, then, I went and reported again, and I left again. And, after I got in, I told him I was going to have to go to the doctor with my back.

Q. Did you hurt the same part of your back on January 5th, as you had hurt in the past?

A. Yes, and I told them I had to go to the doctor.

Q. Who did you tell that to?

A. The manager.

Q. Is that Mr. Vince, again?

A. Right. And, so, they told me I would have to go to the company doctor.

Q. Who was that?

A. This young fellow in Pompano.

Q. Dr. Monserrate?

A. I believe so. That was the one when I went up there. I went to him. When he got to me, he

took x-rays. That was on the 8th. He put me on a table—before he took the x-rays, he put me on a table and pulled my legs. I said, Doctor you are hurting me. He kept on yanking on me, and took the x-rays, and told me to come back in four days.

The January 5, 1973, accident date is also supported by the Claimant's testimony on TR 172, as well as that of his wife at TR 191. Furthermore, the January 5th accident date appears on the S.F.-2 Form of the first treating physician, Dr. Monserrate. (TR. 318).

The evidence clearly supports a January 5th date of accident and proper notice to the employer. The Claimant testified to notifying the manager, Mr. Vince, following the January 5th occurrence. The employer sent the Claimant to Dr. Monserrate and later authorized a change of physicians to Dr. Rahilly. (TR. 169-170) This is supported by the SF-2 form of Dr. Monserrate which indicates that his services were engaged by Sea Tower Apartments. (TR. 318)

These important facts are entirely omitted from the Petitioner's Statement of the Facts.

These facts, based on sworn testimony and other evidence in the record, clearly support the Claimant's industrial accident of January 5, 1973. They further support notice to the employer within 30 days of the January 5, 1973, accident.

Stipulations by Liberty Mutual at the hearing before Judge Carson on August 30, 1973, are clearly supported by the evidence adduced prior to and at that hearing.

Judge Carson entered his compensation order on September 7, 1973. (TR. 390-401) Following receipt

of that order by Liberty Mutual, Mr. McBryde telephoned Insurance Company of North America on September 12, 1973, and informed INA that it was the position of Liberty Mutual that Liberty did not have coverage for the January 5, 1973, accident and that it was INA's responsibility. The telephone conversation was followed up with a letter from Mr. McBryde dated September 13, 1973. (TR. 130). This was done in accordance with Florida Statute 440.42(3) which pertinent part states as follows:

> When there is any controversy as to which of two or more carriers is liable for the discharge of the obligations and duties of one or more employers with respect to a claim for compensation, remedial treatment or other benefits under this chapter, the division shall have jurisdiction to adjudicate such controversy; and if one of the carriers voluntarily *or in compliance with a compensation order* makes payments in discharge of such liability and it is finally determined that another carrier is liable for all or any part of such obligations and duties with respect to such claim, the carrier which has made payments either voluntarily *or in compliance with a compensation order* shall be entitled to reimbursement from the carrier finally determined liable, and the division shall have jurisdiction to order such reimbursement; provided, however, that if the carrier finally determined liable can demonstrate that it has been prejudiced by lack of knowledge or notice of its potential liability, such reimbursement shall be only with respect to payments made after it had knowledge or notice of its potential liability. (Emphasis supplied).

Judge Carson's order of September 7, 1973, was vacated but subsequently re-instated on October 3,

1973. (TR. 407-408). From that order a timely application for review was filed in behalf of the carrier and employer. (TR. 411-414).

The Industrial Relations Commission, on May 27, 1974, entered its order reversing the order of the Judge of Industrial Claims and remanding the case to Fort Lauderdale for reconsideration and the entry of an appropriate order fixing the amount of disability to which the Claimant was entitled and determining the liability of the respective carriers. (TR. 444-451).

The order of the Industrial Relations Commission reversed the order of the Judge of Industrial Claims and Petition for Certiorari was timely filed in behalf of the employee/claimant. The Petition for Certiorari was denied and the Industrial Relations Commission order of May 27, 1974, affirmed. The cause was then re-assigned to Judge Pacyna for further proceedings in accordance with the Industrial Relations Commission Order of May 24, 1974, i.e., fixing the amount of disability to which the Claimant was entitled and determining the liability of the respective carriers.

On November 21, 1975, hearing was conducted before Judge P. A. Pacyna to determine the responsibility between the respective carriers. Primary defenses raised by Insurance Company of North America at that hearing were estoppel and waiver. (TR. 89-90). These were specifically rejected by Judge Pacyna's order of January 2, 1976. Judge Pacyna's order directed each carrier to pay fifty (50%) percent of the determined benefits. Liberty Mutual appealed that order and INA cross-appealed. (TR. 454-460).

By order of November 8, 1976, the Florida Industrial Relations Commission concluded that INA was

solely responsible for the payment of benefits to Mr. Mosley for injuries arising out of the industrial accident of January 5, 1973. (1a).

Petition for Certiorari was filed with the Supreme Court of the State of Florida. This petition was denied and the Industrial Relations Commission's order of November 8, 1976, affirmed on June 30, 1977. (2a). INA sought petition for rehearing and same was denied by order of the Supreme Court of Florida on October 21, 1977. (3a).

REASONS FOR DISALLOWANCE OF A WRIT OF CERTIORARI WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT FOR RESOLUTION BY THE SUPREME COURT OF THE UNITED STATES

Florida Statute 440.41 provides as follows:

Florida Statutes

§ 440.41 SUBSTITUTION OF CARRIER FOR EMPLOYER.—

In any case where the employer is not a self insurer, in order that the liability for compensation imposed by this chapter may be most effectively discharged by the employer, and in order that the administration of this chapter in respect of such liability may be facilitated, the division shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this chapter upon the employer, as it considers proper in order to effectuate the provisions of this chapter. For such purposes

(1) *Notice to or knowledge of an employer of the occurance of the injury shall be notice to or knowledge of the carrier;*

(2) Jurisdiction of the employer by the division, the commission, or any court under this chapter shall be jurisdiction of the carrier; and

(3) Any requirement by the division, the commission, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer. (Emphasis supplied).

INA's contention that they were denied the opportunity to defend against the accident of January 5, 1973, or notice thereof, is frivolous or without merit at best.

The record is clear that notice of the injury was given to the employer by the Claimant. It was given to Mr. Vince and to Mr. Bergander. (TR. 382). Furthermore, the employer sent the injured Claimant *to Dr. Monserrate within three days* of the incident which clearly is within the 30 day period for giving notice of injury under F. S. 440.18. *Under F. S. 440.41, notice to the employer is notice to the carrier.* Florida adopted Sections 440.41 and 440.42(3) to resolve or prevent the very issues that INA seeks to raise in this case and thereby defeat one of the self-administrating features of the Workmen's Compensation Act. The employer's knowledge of the Claimant's accident on January 5, 1973, constituted notice to the carrier of that accident. (F. S. 440.41(1)).

Respondent submits the Florida Industrial Relations Commission and the Supreme Court of the State of Florida applied the appropriate law to the instant case. The Insurance Company of North America's argument that their rights were prejudiced and that they were denied due process by Liberty Mutual's

stipulating to an accident of January 5, 1973, is contrary to the evidence and the law. Sea Tower Apartments had knowledge of the January 5, 1973, accident. Liberty Mutual Insurance Company conducted a defense on behalf of the employer for all alleged dates of accidents. The INA contention that the stipulation by Liberty Mutual to the January 5, 1973 accident was not supported by the evidence or was prejudicial to the ultimate outcome of the case is contrary to the evidence and the law. (See Industrial Commission's order of November 8, 1976, in Appendix 8a of Petitioner's brief.)

The Workmen's Compensation law of Florida is intended to be self administering. To grant INA a trial de nova under the facts in this case on the alleged grounds of denial of due process would be to defeat the purposes of the Act. The Florida Industrial Relations Commission and the Florida Supreme Court have properly determined the issue of due process in this case. There is no substantial federal question to justify the United States Supreme Court taking jurisdiction in this case. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID A. DANIELSON
ANTHONY J. BEISLER, P. A.
1650 N. E. 26th Street
Fort Lauderdale, Fla. 33305

THEODORE R. HAINLINE
HAINLINE & BILLING
200 S. E. Sixth Street
Fort Lauderdale, Fla. 33301

Attorneys for Respondents

APPENDIX

STATE OF FLORIDA
INDUSTRIAL RELATIONS COMMISSION

CL. No. 261-30-7754

D/A. 3/25/69; 9/9/69; 12/22/72

SEA TOWER APARTMENTS; LIBERTY MUTUAL INSURANCE CO., *Appellants/Cross-Appellees*

v.

SEA TOWER APARTMENTS; INSURANCE COMPANY OF NORTH AMERICA, *Appellees/Cross-Appellants*

ROBERT LEE MOSLEY, *Claimant/Appellee*

Anthony J. Beisler, Fort Lauderdale, for Appellants/Cross-Appellees

Fleming, O'Bryan & Fleming, Fort Lauderdale, for Appellees/Cross-Appellants

Law Offices of Nolan & Usdan, Fort Lauderdale, for Claimant/Appellee

(RECEIVED NOVEMBER 9, 1976)

Order

FRIDAY, Chairman.

The Judge of Industrial Claims entered an Order on January 2, 1976, which found that both carriers had coverage in behalf of the employer on the date of the accident in question, and required an equal contribution by each for future benefits, and denied reimbursement to Liberty Mutual Insurance Company for previous benefits voluntarily paid by it. The appellants filed an application for review by the Industrial Relations Commission of that Order, and present the following points on appeal:

1. Did the Judge of Industrial Claims err in ordering reinstitution of temporary total disability compen-

sation benefits to the claimant from the date when Liberty Mutual suspended compensation, on or about September 15, 1973, and to continue until maximum medical improvement was reached?

2. Did Judge Pacyna err in finding there was dual coverage on January 5, 1973?

3. Did Judge Pacyna err in failing to direct the Insurance Company of North America to reimburse Liberty Mutual Insurance Company for all compensation benefits and medical benefits furnished to the claimant by Liberty Mutual Insurance Company because of the injury suffered by the claimant in the accident of January 5, 1973?

The history of this cause includes a previous compensation Order of October 3, 1973, which, among other things, found the claimant to be permanently and totally disabled. On appeal, this Commission reversed that finding, *Sea Tower Apartments* v. *Mosley,* IRC Order 2-2621 (May 27, 1974); cert. den. w/o opinion in *Mosley* v. *Sea Tower Apartments,* 326 So.2d 174 (Fla. 1975). The cause was remanded for the entry of a further Order fixing the amount of permanent partial disability to which claimant would be entitled, and resolution of the question of liability of the respective carriers. The Order entered by the Judge of Industrial Claims upon that remand is the subject of this appeal.

The record discloses that the employer, through its board of directors, in early December directed that its insurance coverage, specifically including workmen's compensation, be terminated as to Liberty, and replaced through INA. The evidence clearly shows that this was accomplished, through the employer directly with its insurance agency, and his testimony (R-40) is that he recommended that INA take over the workmen's compensation insurance on the expiration date of the existing policy with Liberty, which

was January 1, 1973; that he subsequently received a letter from the president of the employer, dated December 14, 1972, Liberty Exhibit No. 1 (R-102), and that subsequently per Liberty Exhibit No. 2, (R-104), the witness, as agent for INA, advised that the Liberty policy was cancelled flat effective January 1, 1973, and that it had been replaced by INA policy no. NWC15-57-93; he further testified that he received the INA policy, effective January 1, 1973, whereupon he did return the Liberty policy to them, per Liberty Exhibit No. 2. At R-43 he further explains the purpose of this communication to Mutual as "To return the policy to Liberty Mutual with a cancellation back to its inception date, in order that there would be no earned premium under that policy chargeable to Sea Tower, . . .".

Thereafter, at R-44, he testifies that the employer had some claims forms from Liberty on hand, and (R-54) that on new accounts he generally advised his new clients to submit accident reports tc his agency until they become acquainted with how to send them to the carrier itself, and . . .

Q And you advised them to submit accident reports to your agency until they became acquainted on how to submit them?

A No, I didn't. They had a procedure. The building manager had a procedure where he had already been filing these reports through Liberty since 19—I don't remember. I think the account had been since 1958 or 1959.

• • •

Q Did you send along any instructions as to how they should file their claims?

A That procedure, to the best of my knowledge, comes directly from the Tampa office.

Q Well, my question to you is did you?

A No, sir, I did not.

As to Point 1 on appeal, the Order must be reversed insofar as its orders reinstitution of temporary total disability benefits. The parties to this cause had stipulated, which stipulation is still acknowledged, to a settlement of that question, the Order is violative of that stipulated settlement, and therefore is reversed.

As to Point 2 on appeal, the Order must be reversed. The record clearly reflects that, beginning January 1, 1973, Liberty coverage for this employer was terminated and INA coverage for this employer was instituted. There is no competent substantial evidence to support a finding of dual coverage between these carriers, as purported by the Order, thus the record would permit no finding and holding except that sole coverage was with INA. The Order is accordingly reversed.

As to Point 3 on appeal, the Order must be reversed. The record clearly reflects that Liberty paid medical and compensation benefits because of the accident of January 5, 1973, through good faith error and misunderstanding, and at a time when coverage was with INA. They are entitled to reimbursement for those payments from INA, it was error for the Judge to deny that reimbursement, and the Order is accordingly reversed and remanded to the Judge of Industrial Claims for the entry of a further Order consistent with this opinion.

As to the points on cross-appeal, numbered 4 and 5, we conclude that the Order is correct as to each of them and affirm the Order with respect thereto.

The Order is accordingly affirmed in part, reversed in part, and reversed and remanded in part, as related.

The employer, Sea Tower Apartments, through its carrier, Insurance Company of North America, is directed to pay the sum of Five Hundred Dollars ($500.00) to counsel for appellee Robert Lee Mosley, for services rendered on this appeal.

It is so ordered.

INDUSTRIAL RELATIONS COMMISSION
ELMER O. FRIDAY, JR., Chairman
LEANDER J. SHAW, JR., Commissioner

THIS IS TO CERTIFY that on this November 8, 1976, the above Order was filed in the office of the Industrial Relations Commission at Tallahassee and a copy mailed to each party at his last known address.

INDUSTRIAL RELATIONS COMMISSION

/s/ By R. AKINS
Deputy Clerk
(Title)

SEAL
cc: Philip A. Pacyna
Judge of Industrial Claims

SUPREME COURT OF FLORIDA

THURSDAY, JUNE 30, 1977

Case No. 50,710

INDUSTRIAL RELATIONS COMMISSION
INSURANCE COMPANY OF NORTH AMERICA, *Petitioner,*

vs.

ROBERT LEE MOSLEY, ET AL, *Respondents.*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Industrial Relations Commission and the Court finding no departure from the essential requirements of law, it is ordered that said petition be and the same is hereby denied. See: *Scholastic Systems, Inc., et al. vs. LeLoup, et al.,* 307 So. 2d 166 (Fla. 1974).

OVERTON, C. J., BOYD, ENGLAND and SUNDBERG, JJ., concur
ADKINS, J., dissents

The motion for attorney's fee filed by attorney for respondent, ROBERT LEE MOSLEY, is granted and said attorney is hereby allowed a fee of three-hundred and fifty dollars ($350) for services in this Court, said sum to be paid to said attorney by petitioner within fifteen days after final disposition of this cause.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

C

cc: Mrs. Verna Martin, Clerk

Hon. Frank E. Maloney, Jr.
of Fleming, O'Bryan & Fleming

Hon. Gerald T. Nolan
of Nolan & Usdan

Hon. Anthony J. Beisley

By: Dublin Causseaux
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FRIDAY, OCTOBER 21, 1977

Case No. 50,710

INSURANCE COMPANY OF NORTH AMERICA, *Petitioner*,

vs.

ROBERT LEE MOSLEY, ET AL., *Respondents*.

On consideration of the petition for rehearing filed by attorneys for petitioner, and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

OVERTON, C. J., BOYD, ENGLAND and SUNDBERG, JJ., Concur
ADKINS, J., Dissents

Motion for Attorney's Fees filed by attorneys for Respondent, ROBERT LEE MOSLEY, for services rendered in conjunction with Petition for Rehearing is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C

cc: Mrs. Verna Martin, Clerk
Hon. Frank E. Maloney, Jr.
of Fleming, O'Bryan & Fleming
Hon. Dennis M. Usdan and
Hon. Gerald T. Nolan
of Nolan & Usdan
Hon. Anthony J. Beisler

By: Dublin Causseaux
Deputy Clerk